Malaysian Industrial Development Finance Bhd v Yong Kah Lee

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D6–22–1230 OF 1999
MOHD HISHAMUDIN J
20 FEBRUARY 2003

Civil Procedure — Summary judgment — Triable issues — Whether non service of notice of discontinuance of earlier suit is triable issue

Civil Procedure — Discontinuance — Whether discontinuance effective — Non service of notice of discontinuance — Proof of service — Whether amount to triable issue — Rules of the High Court 1980 O 21 r 2(1) & O 62 rr 1(1), 6(1)

The plaintiff had in 1989 filed a writ action against the defendant ('the first suit') in respect of a loan and guarantee default. Subsequently, on 30 September 1997, the plaintiff filed a notice of discontinuance of the first suit. However, in 1999, the plaintiff filed the present writ action against the defendant, and this time against the defendant alone. The cause of action against the defendant in the present suit was the same as the cause of action against him in the first suit. It was the contention of the defendant that the notice of discontinuance was not served on him and that he was not aware of the discontinuance of the first suit; and that all the while he was under the impression that the first suit was still alive. The senior assistant registrar dismissed the plaintiff's application for summary judgment against the defendant. The plaintiff appealed.

Held, dismissing the appeal with costs:

There was a triable issue as to whether or not the notice of discontinuance was served by the plaintiff on the defendant as required by O 21 r 2(1) read with O 62 rr 1(1) and 6(1) of the Rules of the High Court 1980 (see para 20). This was a triable issue because service of the notice of discontinuance is mandatory. Since service of the notice is mandatory, therefore, if the court were to make a finding of fact at the conclusion of the trial that there was no service of the notice of discontinuance, then the notice of discontinuance is bad in law. If the notice of discontinuance is bad in law, then as matter of law, there has been no discontinuance of the first suit, meaning that the first suit had not come to an end but is still alive. And if the first suit is still subsisting, then the plaintiff, by filing the present suit, is guilty of committing a multiplicity of proceedings. And the trial court has the power to dismiss or stay the proceeding of the present suit if satisfied that there is a multiplicity of proceedings and that the present suit ought not to be continued (see para 21).

[**Bahasa Malaysia summary**

Plaintif memfailkan satu tindakan writ terhadap defendan pada tahun 1989 ('guaman pertama') berhubung dengan satu pengingkaran pinjaman dan jaminan. Seterusnya, pada 30 September 1997, plaintif telah memfailkan satu notis pemberhentian untuk guaman pertama. Akan tetapi pada tahun 1999, plaintif memfailkan tindakan writ semasa terhadap defendan, dan kali ini terhadap defendan sahaja. Kausa tindakan terhadap defendan di dalam kes semasa sama dengan kausa tindakan di dalam guaman pertama. Ianya merupakan dakwaan defendan bahawa notis pemberhentian tidak diserahkan terhadap beliau dan beliau tidak menyedari yang guaman pertama telah diberhentikan; dan beliau masih beranggapan yang selama ini guaman pertama masih ujud. Penolong kanan pendaftar menolak permohonan plaintif untuk penghakiman terus terhadap defendan. Plaintif merayu.

Diputuskan, menolak rayuan dengan kos:

Terdapat isu boleh bicara iaitu sama ada notis pemberhentian tersebut telah diserahkan oleh plaintif kepada defendan sebagaimana yang dikehendaki di bawah A 21 k 2(1) dibaca bersama dengan A 62 k 1(1) dan 6(1) Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 20). Ini merupakan isu boleh bicara kerana penyerahan notis pemberhentian adalah mandatori. Oleh kerana serahan notis adalah mandatori, dari itu, jika mahkamah membuat keputusan fakta pada akhir perbicaraan yang bahawa tiada serahan notis pemberhentian, maka notis pemberhentian tersebut adalah tidak sah pada undang-undang. Jika notis pemberhentian tersebut tidak sah pada undang-undang, maka, dari segi undang-undang, tiada pemberhentian guaman pertama, ini bermakna yang guaman pertama belum lagi berakhir dan ianya masih ujud. Dan jika guaman pertama masih ujud, maka plaintif, dengan memfailkan guaman semasa, telah melakukan kesalahan kepelbagaian prosiding. Dan mahkamah bicara mempunyai kuasa untuk menolak atau menggantung prosiding guaman pertama jika ia puas hati dan mendapati kepelbagaian prosiding dan guaman pertama tidak wajar diteruskan (lihat perenggan 21).]

Notes

For cases on summary judgements, see 2(3) Mallal's Digest (4th Ed, 2001 Reissue) paras 6103–6173.

For cases on whether a discontinuance was effective, see 2(2) Mallal's Digest (4th Ed, 2001 Reissue) paras 2051–2025.

For cases on summary judgments, see Halsbury's Laws of Malaysia (2002 Reissue) paras [10.6–048]–[10.6–057].

Legislation referred to

Courts of Judicature Act 1964 Schedule para 11

Rules of the High Court 1980 O 14, O 21 r 2(1), O 62 rr 1(1), 6(1), 9

T Sagadevan (Shearn Delamore & Co) for the plaintiff.
K Shanti (Ling Theng Bok) for the defendant.

Mohd Hishamudin J:

[1] This is an appeal by the plaintiff against the decision of the learned senior assistant registrar given on 22 May 2001. The senior assistant registrar, in her decision, had dismissed the plaintiff's application for an O 14 summary judgment against the defendant.

[2] I have dismissed the appeal with costs, and I now give my grounds.

[3] In my judgment, summary judgment cannot be granted to the plaintiff as the defendant has succeeded in satisfying me that there is a triable issue. And the triable issue is: Whether the notice of discontinuance filed by the plaintiff in a previous suit pursuant to O 21 r 2(1) of the Rules of the High Court 1980 ('RHC'), which is also a suit by the plaintiff against the defendant, and involving the same cause of action, has been duly served on the defendant by the plaintiff, as required by the RHC.

[4] To appreciate the issue, it is important to know the background facts.

[5] In the present case, the plaintiff's claim against the defendant is for, *inter alia*, a sum of RM2,858,326.30, a claim pursuant to a bank guarantee. It is not disputed that the defendant had stood as guarantor in respect of a loan given by the plaintiff to a borrower, a company known as Lian Huat Seng Plastic Industries Sdn Bhd ('the borrower'). It is alleged by the plaintiff that the borrower defaulted on the loan, and that the defendant, upon demand by the plaintiff, had refused to honour his obligation as a guarantor under the guarantee.

[6] Now, previously, before the plaintiff filed the present suit in 1999, the plaintiff had, in 1989, already filed a writ action against the defendant ('the first suit') in respect of the same loan and the same guarantee. This first suit, filed in the High Court of Kuala Lumpur (Commercial Division), is known as Suit No D5–22–1650 of 1990. But this first suit is not against the defendant alone. It was against the defendant (as guarantor), the borrower and the two other guarantors.

[7] Subsequently, some eight years later, the plaintiff decided to withdraw its action against the defendant in the first suit. So, the plaintiff filed a notice of discontinuance as required by O 21 r 2(1) of the RHC on 30 September 1997. The plaintiff in its affidavits does not give any reason for the discontinuance.

[8] Then, some one and half years later after the filing of the notice of discontinuance, the plaintiff, on 30 April 1999, filed the present writ action against the defendant, and this time against the defendant alone. It is not

disputed — and this is pertinent — that the cause of action against the defendant in the present suit is the same as the cause of action against him in the first suit.

Order 21 r 2(1) of the RHC stipulates:

> Discontinuance of action, etc, without leave.
>
> 2 (1) The plaintiff if action begun by writ may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.

[9] It is not disputed that in the first suit the defendant did not file any statement of defence and that on the facts O 21 r 2(1) applies to the plaintiff's notice of discontinuance.

[10] Now, it is to be observed that under the rule, by reason of the words:

> by serving a notice in Form 36 to that effect on the defendant concerned

the notice of discontinuance had to be served by the plaintiff on the defendant. And O 62 r 1(1) and r 6(1) of the RHC provides that the service was to be effected either by personal service, or by any of the following means:

(a) by leaving the notice of discontinuance at the proper address of the defendant;

(b) by prepaid registered post; or

(c) by such other means as the Court might direct.

[11] Further, O 62 r 9 prescribes for the filing of an affidavit of service, after the service of the notice of discontinuance. The provision reads:

> 9 Affidavit of service
>
> An affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served, where it was served and how and must be in one of the forms in Form 137.

[12] Now, was the notice of discontinuance served by the plaintiff on the defendant?

[13] It is the contention of the defendant that the notice of discontinuance was not served on him and that he was not aware of the discontinuance of the first suit; and that all the while he was under the impression that the first suit was still alive.

[14] The plaintiff, on the other hand, contends otherwise. It is alleged by the plaintiff that the notice had been served on the defendant.

[15] Now, in my judgment, when the defendant denies having had knowledge of the notice of discontinuance, it is then incumbent on the plaintiff to furnish particulars of the service of the notice together with the necessary supporting documents.

[16] However, in the present case, the plaintiff, besides failing to file any affidavit of service as required by O 62 r 9, also did not state in its supporting affidavits by whom the notice of discontinuance was served, the day and date and in what manner the notice was served on the defendant. Nor was any supporting document exhibited in the supporting affidavits. In para 5 of the plaintiff's affidavit at encl 10, the plaintiff's general manager merely averred as follows:

> 5 Saya merujuk kepada perenggan 25 afidavit defendan. Saya dinasihati peguamcara plaintif yang mana saya sesungguhnya percaya sebagai benar bahawa guaman sivil pertama tersebut tidak 'hidup' lagi seperti yang dideposkan oleh defendan. Peguamcara plaintif telah pada 30 September 1997 memfailkan notis pemberhentian di dalam kes tersebut. Dilampirkan di sini dan ditandakan sebagai eks 'KCG-6' adalah sesalinan Notis Pemberhentian bertarikh 30 September 1997 dan surat-surat penyampaian Notis tersebut. Sebagai tambahan kepada pemfailan, peguamcara plaintif telah juga menghantar sesalinan Notis Pemberhentian tersebut kepada Penolong Kanan Pendaftar Mahkamah Tinggi Dagang 5.

[17] And a similar vague averment is repeated by the said deponent in para 4 of his affidavit at encl 14.

[18] All that the plaintiff could adduce in its affidavits are a copy of the notice of discontinuance and a copy of a covering letter dated 30 September 1997 from the plaintiff's solicitor to the defendant (see exh KCG–6 of encl 10) which reads:

> Dear Sir, REGISTERED
>
> RE: LIAN HUAT SENG PLASTIC IND SDN BHD
>
> We enclose herewith a copy of the 'Notis Pemberhentian' dated 30 September 1997 by way of service upon yourself.
>
> *Kindly acknowledge receipt.*

[19] It is observed that despite the word 'REGISTERED' in the above letter, there is no document (such as the usual post office 'registered letter' receipt/slip) exhibited in the plaintiff's affidavits to show that the letter was indeed sent by registered post. Also, despite the word:

> We enclose herewith a copy of the 'Notis Pemberhentian'

in the above letter, yet I do not find any copy of 'Notis Pemberhentian' attached to the above copy of the covering letter KCG–6 (the single 'Notis Pemberhentian' that is also exhibited as exh KCG–6 is merely intended to show that such a notice was filed in court by the plaintiff). Again, despite the words:

> Kindly acknowledge receipt

at the end of the letter, yet there is no documentary evidence (or, indeed, any form of evidence) adduced by the plaintiff to show acknowledgement of receipt by the defendant. In short, there is no evidence at all to show service of the notice of discontinuance on the defendant or receipt of the same by the defendant. Mere production of the above covering letter cannot be taken as evidence of service of the notice of discontinuance on the defendant: at best it is only evidence that such a letter was written by the plaintiff.

[20] Hence, in the present case, there is a triable issue as to whether or not the notice of discontinuance was served by the plaintiff on the defendant as required by the O 21 r 2(1) read with O 62 rr 1(1) and 6(1) of the RHC.

[21] I hold that this is a triable issue because, in my view, service of the notice of discontinuance is mandatory. Since service of the notice is mandatory, therefore, if the court were to make a finding of fact at the conclusion of the trial that there was no service of the said notice of discontinuance, then the notice of discontinuance is bad in law. If the notice of discontinuance is bad in law, then, as matter of law, there has been no discontinuance of the first suit, meaning that the first suit had not come to an end but is still alive. And if the first suit is still subsisting, then, the plaintiff, by filing the present suit, is guilty of committing a multiplicity of proceedings. And the trial court has the power to dismiss or stay the proceeding of the present suit if satisfied that there is a multiplicity of proceedings and that the present suit ought not to be continued. Paragraph 11 of the Schedule to the Courts of Judicature Act 1964 provides:

> 11 Res judicata
>
> Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

Appeal dismissed.

Reported by Loo Lai Mee